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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted]139

DIAMOND KIMM, *Petitioner*,

v.

EDWARD C. HOY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit, which affirmed a judgment of the United States District Court for the Southern District of California, Central Division, entered against petitioner in his suit to review and enjoin a deportation order.

OPINION BELOW

The opinion below (V R. 3-17 and Appendix B herein) is reported at 263 F. 2d 773.

JURISDICTION

The judgment below (V R. 18 and Appendix A herein) was entered on February 19, 1959. A timely petition for rehearing was denied on March 30, 1959 (V R. 19). Jurisdiction of this Court exists under 28 U. S. Code 1254(1).

QUESTION PRESENTED

Whether an alien may lawfully be held ineligible for suspension of deportation and the privilege of voluntary departure solely because he declined, on the basis of the privilege against self-incrimination, to testify whether he was or had ever been a member of the Communist Party.

STATUTE INVOLVED

The Act of July 1, 1948, 62 Stat. 1206, amended section 19(c) of the Immigration Act of February 5, 1917, as amended, 54 Stat. 671, 56 Stat. 1044, to read in part as follows:

> "(c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act."

STATEMENT OF THE CASE

Petitioner, a native of Korea, was admitted to the United States on July 6, 1928, as a non-quota immigrant student under section 4(e) of the Immigration Act of May 26, 1924, as amended, 43 Stat. 155, 45 Stat. 1009. He attended schools in the United States until 1938, receiving baccalaureate and graduate degress in mining and metallurgy. (V R. 3; D. Ex. A; BIA dec. 1/22/52, p. 1.)

War between Japan and China had broken out in 1937, and petitioner was unwilling to return to Japanese-occupied Korea, where he would have had to contribute to Japan's war machine by working under governmental authority as a technician. Accordingly, after he stopped attending school, he obtained work and remained in the United States. (D. Ex. A; tr. 26-27; V R. 3, 11-12.)

Deportation proceedings were commenced against petitioner in December 1941, culminating in an order of the Board of Immigration Appeals of April 17, 1943. Petitioner was found deportable for having failed to maintain the exempt student status under which he had been admitted. However, as a result of a finding of good moral character for the preceding five years, he was granted permission to depart voluntarily from the United States to any country of his choice within ninety days after issuance of an exit permit or after the time such permits were no longer required. (V R. 4-5; D. Ex A: ex. 6; Govt. Ex. D: proposed findings.)

The privilege of voluntary departure was academic during the war, and petitioner continued to stay and work in the United States (V R. 11-12). In July 1945, he entered the employ of the Office of Strategic

Services, at its solicitation, and was trained for a secret mission into Japanese-occupied territory as an American spy. The Japanese surrender came before the mission could be fulfilled, and in September 1945, petitioner was released from the OSS. (D. Ex. A: tr. 46-50.) He then made several applications to the State Department for an exit permit to return to his homeland, but never received a reply (D. Ex. A: tr. 27-29, BIA dec. 1/22/52, p. 2).

In April 1949, the Immigration and Naturalization Service ordered petitioner's deportation hearing reopened in order to allow him to apply for suspension of deportation under the amendment of July 1, 1948 (*supra*, p. 2), which liberalized section 19(c) of the Immigration Act of 1917, as amended (V R. 3-4).[1] The amendment authorized the Attorney General to suspend deportation or permit voluntary departure for, inter alia, aliens (other than those to whom section 19(d) of the Immigration Act was applicable) who proved good moral character for the preceding five years, were not ineligible for naturalization or (like petitioner) were ineligible solely because of race, and resided in the United States on July 1, 1948. The amendment thus excluded from relief members of organizations advocating violent overthrow of the United States government, but not, in terms, members of the Communist Party.[2]

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[1] The 1948 provision remains in effect for suspension applications made after its enactment and prior to its repeal by the current Immigration and Nationality Act. See the savings clause, sec. 405(a) of the latter Act, 66 Stat. 280; *United States ex rel Accardi* v. *Shaughnessy*, 347 U.S. 260, 261 n. 1.

[2] As stated in the text, aliens to whom section 19(d) was applicable were excluded from relief under amended section 19(c). Section 19(d), added by the Alien Registration Act of 1940, 54

At the reopened hearings, held in 1950 and 1951, petitioner applied for suspension of deportation and, in the alternative, for the privilege of voluntary departure (V R. 5-6; D. Ex. A: tr. 26, 44). He introduced affidavits attesting to his good character (D. Ex. A: exs. 5, 14) and a letter from the War Department lauding him for his OSS service (D. Ex. A: ex. 15). The Immigration and Naturalization Service introduced reports of investigation of petitioner by the Service and the FBI. These showed that nothing derogatory had been discovered concerning petitioner's moral character or loyalty to the United States, and that in 1943 he had been cleared by the War and Navy Departments for industrial employment on classified government contracts. (D. Ex. A: tr. 37, exs. 10, 11.)

Petitioner was questioned at length by a Service representative, whose inquiries were permitted by the hearing officer on the theory that since petitioner was applying for discretionary relief, the government was entitled to know "all of the facts" about him and his "complete history"[2] (D. Ex. A: tr. 15, 17). In the course of the interrogation, the Service representative asked petitioner whether he was or ever had been a member of the Communist Party. On advice of his counsel, petitioner claimed the privilege against self-incrimination and refused to answer. (D. Ex. A: tr. 17, 55, 56.) No evidence was introduced that petitioner was or ever had been a member of the Communist Party. Nor was any other evidence introduced derogatory to petitioner or adverse to his application.

Stat. 671-673, applied to, among others, persons deportable under the anarchist exclusion and expulsion Act of October 16, 1918, as amended. The latter act, as amended, 54 Stat. 673, amending 41 Stat. 1008, which amended 40 Stat. 1012, included members of organizations advocating violent overthrow.

The hearing officer recommended denial of suspension and withdrawal of the privilege of voluntary departure on the ground that petitioner, by asserting his privilege to the questions on Communist Party membership, had failed to establish eligibility for relief and had failed to prove the statutory requirement of good moral character for the preceding five years (D. Ex. A.: dec. hrg. off. 1/15/51). The Acting Assistant Commissioner of the Service adopted the hearings officer's recommendations (D. Ex. A: dec. 3/13/51), and the Board of Immigration Appeals affirmed (D. Ex. A: BIA dec. 1/22/52).

The petitioner brought suit against the District Director of the Service to enjoin deportation, alleging, among other things, that the denial of suspension was illegal (I R. 22, 25). The District Court reviewed the administrative record and granted judgment against petitioner. On the issue of suspension, the District Court found:

> "The finding of the hearing officer, as affirmed by the Board of Immigration Appeals, that the plaintiff had not affirmatively proved that he had been a person of good moral character for the past five years, and that he was ineligible for the discretionary relief of suspension of deportation under the provisions of Section 19(e) of the Immigration Act, as amended [8 U.S.C. 155(e) 1950 Ed.], is supported by reasonable, substantial and probative evidence." (I R. 38-39.)

The Court of Appeals affirmed, holding that petitioner, by declining to answer the questions on Communist Party membership, had failed to establish eligibility for suspension and good moral character (V R. 13-14).

REASONS FOR GRANTING THE WRIT

Petitioner has been held ineligible for suspension of deportation and voluntary departure solely because he declined, on the basis of the Fifth Amendment, to answer questions about Communist Party membership. This declination, of course, was not evidence, nor could it justify any inference of guilt. *Slochower* v. *Board of Education*, 350 U.S. 551; *Grunewald* v. *United States*, 353 U.S. 391, 421. All the evidence in the record demonstrates that petitioner satisfied the statutory conditions for eligibility, including good character. Nevertheless, the court below held that petitioner was not eligible and had not established good character because of his declination to answer.

The decision below cannot be reconciled with *Konigsberg* v. *State Bar of California*, 353 U. S. 252. There the Committee of Bar Examiners had rejected an application for membership in the bar on the stated grounds that the applicant, having refused to answer questions about Communist Party membership, had "failed to demonstrate that he was a person of good moral character" and had "failed to show that he did not advocate the overthrow of the Government of the United States or of the State by force, violence or other unconstitutional means" (at 259). This Court held that the rejection was arbitrary and discriminatory, and therefore a denial of due process and equal protection (at 262).

In the present case, furthermore, the declinations were based on the privilege against self-incrimination. The denial of suspension and voluntary departure because of the declinations amounts, therefore, to the infliction of a penalty on the assertion of the privilege. This collides with the constitutional guaranty and with *Slochower, supra.*

The record in this case contains not even an unsupported accusation that petitioner was ever a member of the Communist Party. The subject came up as a happenstance in a random inquiry conducted and allowed on the distasteful and untenable theory that an applicant for suspension subjects himself to an unlimited official inquisition into his personal life. Although the Service was entitled to make reasonable inquiries to determine whether petitioner had good moral character and was otherwise eligible for suspension, its procedure in this case, in a field involving First Amendment rights, was not a "fair method" for determining eligibility, and therefore was constitutionally defective. Cf. *Speiser* v. *Randall*, 357 U. S. 513, 520. Such an inquisition was not a fair and orderly hearing. Cf. *Vitarelli* v. *Seaton*, No. 101, Oct. T. 1958, decided June 1, 1959.

This Court has never determined whether an alien may be held ineligible for statutory relief from deportation solely because of a declination on constitutional grounds to answer questions relating to Communist Party membership. The question is important to the administration of the deportation laws and to the constitutional rights of aliens, and the decision below is at odds with principles expressed in decisions of this Court.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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